THE PROPRIETARY PROVINCE AS A FORM OF COLONIAL GOVERNMENT

I.

It was natural that English merchants and those who were connected with them should select the corporation and adapt it in the seventeenth century to the purposes of colonization. It was a form of local and subordinate government which had long been in existence and which easily lent itself to plans of colonial extension and development. Some of the notable results which followed its utilization in this sphere have been described in another place.[1] It is my purpose in this and the articles which shall follow to attempt, though it must be in an imperfect manner, to show what use was made of the fief, another form of subordinate government, in the process of Anglo-American colonization. With the organization and working of this the landed proprietor was as familiar as was the merchant with the corporation. The county was in form analogous to the fief and, especially when we include Continental history in our view, the development of the two appears most intimately connected. County government was and had been of old a favorite sphere of political activity for the English knighthood and nobility. Therefore when they, or when the king, who was also a territorial lord, undertook the work of colonization, the county presented itself to them as an institution which might properly be utilized for the purpose. But the county which was first selected by the proprietors for imitation on the new continent, was not one of those which existed in the interior of the kingdom, and whose activities had therefore been wholly subordinated to national ends. It was a border county, one of the marches, institutionally a lineal descendant of the marks which had been created by Charles the Great in the outlying regions of his empire for the purpose of defence. William the Norman had in part acknowledged the existence of such an institution and in part reproduced it on the borders of his kingdom of England under the name of the county palatine. In the seventeenth century the same institution was again reproduced with modifications on the western marches of the English maritime empire, and there became the American

[1] See my articles on the Corporation as a Form of Colonial Government in the *Political Science Quarterly* for June, September and December, 1896.

province. It was a county, but one of a very peculiar sort, with a more elaborate internal organization and stronger tendencies toward independence than the central counties of the kingdom possessed. The nature of the American province can be understood only after a study of its English progenitor.

Speaking in general terms, the palatinate or county palatine was the most independent and self-centered of English fiefs. Of those originally created two, Chester and Durham, survived at the time when the American colonies were founded. Save the duchy of Lancaster, which was created by act of Parliament, the counties palatine legally originated in royal grants, though in most cases powers had previously accumulated in the hands of the lord which formed the basis and justification for the grant. The grantee of the palatinate was usually an earl, but his powers were far superior to those regularly associated with that dignity, and he was the official head of the county from which his dignity was named. The head of the palatinate of Durham was always a bishop, sat among the bishops in the House of Lords and ranked next after the bishop of London; but like the other members of his order he held *sicut baroniam*. The county palatine was a great crown fief of the nature of those which existed in France and Germany, and its lord was one of the most powerful of the tenants in chief. In Chester the earl was said to hold by the sword as freely as did the king by his crown. Coke affirmed that the name county palatine was given not "in respect of the dignity of an earl, but . . . . because the owner thereof, be he duke or earl, hath in that county *jura regalia*, as fully as the king had in his palace."[1] The authority of counts palatine he called "king-like." Viner carries the analysis a step further when he says that the royal rights consisted of jurisdiction and seigniory.[2] "By reason of his royal jurisdiction," says Viner, "he (the count palatine) has all the high courts and officers of justice which the king has; and by reason of his royal seigniory he has all the royal services and royal escheats which the king has." The true analogy then is that between the count palatine and the king, rather than one between the earl and the head of the palatinate.

In the language of the lawyers the powers possessed by the counts palatine were the inferior regalities, powers, that is, which were regal in kind, but inferior in degree to those held and exercised by the king. They were in nature territorial and governmental. Prior to the statute *quia emptores* the right of subinfeudation within the county was unlimited. Subsequent to that statute the count

[1] Coke, *Fourth Institute*, edition of 1809, p. 204.

[2] Viner, *Abridgment*, VI., p. 274.

palatine could create no new fiefs, but he was entitled to all the feudal services due from his tenants as they then existed, and to the possession of mines, wastes, forests and chaces.[1] He had also large private domains. On the governmental side his franchise included the right to hold courts of chancery, exchequer, admiralty, wards and liveries, and to hear in them all varieties of pleas, including pleas of the crown; to appoint chancellors, constables, stewards, chamberlains, judges, justices of the peace, sheriffs, coroners, escheators, with powers similar to the king's officers in the realm; to issue writs, precepts and commissions in his own name; to impress ships and call out his tenants in military array; to coin money, establish ports, markets and fairs, grant letters of incorporation and charters of privileges; to create palatine barons and hold councils in the nature of parliaments; to levy aids and subsidies.[2] The count palatine of Chester held a local parliament, which probably consisted of eight lay and eight spiritual barons.[3] From this it appears that originally within the county palatine a very complete system of government of the feudal type was maintained. It was an *imperium in imperio*, the existence of which could be justified from the national standpoint only by the exigencies of border defence.

As the count could try and punish all crimes, even treason and felony, so he might pardon the same. He was then the keeper of the peace of the palatinate, and trespasses and other offences were said in Durham to be committed *contra pacem episcopi*.[4] The only one of the royal writs which originally ran into the counties palatine was the writ of error. Transitory actions might, according to the general principle covering them, be tried in an adjacent county, but all other civil suits in which both parties involved were tenants of the count must be tried in the palatinate. But by the legislation of Henry VIII., occasioned partly by the Pilgrimage of Grace, the judicial powers of the counts palatine were seriously curtailed. By this[5] it was provided that thenceforth all writs, original as well as judicial, should run into these liberties, as they did elsewhere in the kingdom; that indictments should be in the name of the king; that the king should appoint justices of oyer and terminer, of the peace, of assize, and of jail delivery in the liberties, and that all statutes made concerning sheriffs and under-sheriffs should be in force against the stewards and other similar officers of the counts pala-

[1] Surtees, *History of Durham*, I. 16, 34, 46.

[2] Hardy, Preface to *Registrum Palatinum Dunelmense*, Rolls Series.

[3] Ormerod, *History of Chester*, I. 51 *et seq.* Stubbs, *Const. History of England*, I. 364, n.

[4] Viner, VI. 573, 575, 576.

[5] 27 Henry VIII., c. 24.

tine. Thus the king became the keeper of the peace in the palatinate. In the same reign representatives were first summoned from Chester to attend the House of Commons, though Durham remained legally free from that obligation till 1675.[1] When the counties palatine came to be represented in Parliament the system of taxation existing in the realm was extended into these liberties and thus all except the shadow of former independence disappeared. Though no record appears of serious or continued opposition to the rule of the counts palatine on the part of their own tenants, since the cessation of border wars the growth of national unity has proved an irresistible foe to the continuance of special jurisdictions except in cases where location, race or culture have made their survival a necessity.

When the earliest charters for the purposes of discovery and settlement were issued by the English crown the fief was chosen as the model for the grants. The charter which was granted in 1497 to John Cabot and his three sons provided that they should subdue and possess the territories they discovered as the "vassals and lieutenants" of the king.[2] From this the second patent, issued the next year, did not essentially differ.[3] By the charter of 1502 issued to Hugh Eliot, Thomas Ashurst and others the grantees were empowered to occupy the territories they should discover as vassals of the English crown.[4] The lands which it was expected Sir Humphrey Gilbert would discover under the patent of 1578 were to be held by homage as a royal fief, but all services were to be discharged by the payment of one-fifth of the gold and silver ore found in the soil.[5] Authority to settle and govern the territories was also given in ampler form than in any earlier grant. The patent issued in 1584 to Sir Walter Raleigh was an almost exact reproduction of that granted to Gilbert six years before. It therefore appears that the fief suggested the form of organization for which the English government provided in the grants which it made to the discoverers of the Tudor period. Raleigh's settlement at Roanoke was a rudimentary proprietorship, the grantee being the proprietor and tenant in chief of the crown. The only corporation which was created for purposes of discovery seems to have been the Colleagues

[1] Durham was represented in the three parliaments of the Protectorate. Surtees, I. 106.

[2] Hakluyt, *Collection of Voyages*, III. 26.

[3] Biddle, *Life of Sebastian Cabot*, Appendix.

[4] Rymer, *Fœdera*, VIII. 37.

[5] Hakluyt, III. 174. This commutation transformed the tenure practically into one of socage, even though the oath of homage continued to be taken. Pollock and Maitland, *History of English Law*, I. 286.

of the Fellowship for the Discovery of the Northwest Passage, of which Adrian Gilbert was the most prominent member, and which received its charter in February, 1584.[1]

When in the seventeenth century the planting of colonies was successfully begun, the work was undertaken by proprietors oftener than by corporations. That this indicates a preference of the government for the proprietor over the corporation resident in England, as an agent for colonizing purposes, it would be rash to affirm. In that age of dawning industrialism it was easier to found a proprietorship than to establish a corporation. The initiative of a single individual, be he courtier or idealist in government and religion, would suffice for the former, while the members of a corporation, with the capital they contributed, could be brought together only as the result of a prolonged effort. Oftener than otherwise the proprietary grant was an expression of royal favor which implied nothing except reward for services rendered by the patentee. Only four corporations resident in England were founded for the purpose of establishing colonies on the American continent, and these, with one exception (the Georgia trustees), came into existence prior to 1630. Six more or less permanent proprietorships were established directly by the king—Nova Scotia, Maryland, Maine, New York, Carolina and Pennsylvania. Of these all that proved of lasting importance, save one (Maryland), were founded during the period of the Restoration. Many sub-fiefs were also granted by the corporations and the proprietors, but these often had a brief and always a very imperfect existence, and call for no special attention at this time. But in the multiplication of grants in this form we discern no tendency of the proprietorship as such to supplant the corporation. Of the tendency of the royal province to supplant both the proprietary and the corporate grant there is abundant evidence, but this indicates a growing dislike on the part of the crown for colonization through agencies of any form.

When a proprietary province was created, the governmental machinery of the palatinate was not removed into America, as was done in the case of the corporation of Massachusetts. That would have been useless, to say nothing of its impracticability, for, in the case of the proprietorship, the grantee was a natural person, and the form of the province could not be affected by the place of his residence. Its organization would be the same, whether he resided in England or in the territory which had been granted to him. The spirit also in which the powers of the proprietor were administered would not necessarily be modified to a great degree by his residence in the

[1] Hakluyt, III. 129.

province. As a matter of fact the American proprietors often spent part of their time in their provinces and part in England. When in their provinces it would be less easy to reach them by writ than if they were in England; but power was transmitted, held and exercised in the same way, whatever might be the place of residence chosen by the proprietor. The proprietary grants, then, were imitations, so far as circumstances permitted, of the palatinates of England, and particularly of the county palatine of Durham. That this is true will be made evident by an examination of their charters and of the powers exercised under them, and by the further consideration that the remoteness of these grants from England would have made them in effect palatinates, had they not been originally such in both form and name.

By the Maryland charter, which shows as distinctly as any the characteristics of this form of grant, the patentee, his heirs and assigns were given all and as ample rights, jurisdictions and immunities within the limits of the province as were or had been enjoyed by any bishop of Durham within his bishopric or county palatine. This also is the meaning of the statement that Lord Baltimore and his heirs were made "the true and absolute lords and proprietaries" of the region. The territory granted was moreover expressly made a province, a name was given to it, and it was declared that it should be independent of all other provinces. The fact that the grant was made to Lord Baltimore, his heirs and assigns, shows that it was an heritable fief, with power of alienation in the grantee. It could be leased, sold, or otherwise disposed of, like any estate of land; and in the case of other proprietary grants such transfers were common. It was provided that the proprietor, though tenant in chief, should hold by socage, paying annually a nominal rent to the king. The province was made subject to the king's sovereign control, and all its inhabitants were his liegemen. They retained the right to buy, receive and hold lands, and in correspondence to this the proprietor was empowered to grant or lease the lands of the province to settlers in fee simple or fee tail. The operation of the statute *quia emptores* within the province was suspended, so as to admit of subinfeudation, and in addition it was expressly provided that grants should be held of the proprietor and not of the king. Upon the estates thus bestowed, power was given the proprietor to erect manors, with manorial courts and view of frankpledge. These were the seignorial or territorial rights and powers, so far as they were expressed in the charter. Connected with them more or less closely was the right to transport colonists and goods to the province and to carry on trade with them. In the exercise of this power harbors were to be

erected, where exclusively the business of import and export should be carried on, while taxes and subsidies imposed at the ports were reserved to the proprietor.

But governmental powers, or the minor regalities, were also bestowed on the proprietor in full measure. He was authorized to legislate through an assembly of the freemen concerning all matters of public interest and private utility within the province. The laws thus passed should be published under the proprietor's seal, and executed by him on all inhabitants of the province, and all going to or proceeding from it either to England or to foreign countries. The right to issue ordinances was bestowed in such a way as to supplement the legislative power and, under the general limitations specified in the act 31 Henry VIII., c. 8, concerning proclamations, was to be used for the preservation of the peace and the better government of the people, when there was not time to call the deputies together. The proprietor was given authority to inflict all punishments, even to the death penalty (*haute justice*), and to pardon every crime which he could punish. As the statute of Henry VIII. limiting the independence of the counts palatine did not extend to the plantations, Baltimore was empowered to establish courts and appoint all officers, judicial and other, who were necessary for the execution of the laws. He was also given the right to bestow titles of honor, erect towns and boroughs, and incorporate cities. The powers of a captain-general were given him, with authority by proper means to arm and train the inhabitants and lead them in defensive war. Closely connected with this was the right to execute martial law for the suppression of rebellion. The advowson of churches and chapels, the right to found these and to cause them to be consecrated according to the ecclesiastical laws of England, was also bestowed. The language used apparently excluded the consecrating of other than Anglican churches. The organization of the government was left wholly to the proprietor. The only limitation on the legislative and ordinance powers was that the enactments and orders issued should be consonant to reason and as agreeable as might be to the laws and rights of England. No provision was made for the submission of the acts of the legislature to the king, or for appeal to the English courts, though cases could probably be removed into those courts under the forms and conditions which of old had applied to the palatinates. Moreover, the right to hear appeals exists by virtue of the sovereign power of the crown, and the right to claim its advantages belongs to the subject by common law. Finally, following in the strictest manner the principle of immunity, the king expressly renounced the right to levy taxes upon the province. He

declared that he would not levy any tax or contribution on the persons, lands or goods of its inhabitants, either in the province or in the parts of the same. So far as American charters are concerned, this feature of the grant is unique.

In their provisions the charter of Maine and that of Carolina, save in the point last mentioned, differ only in slight details from the Maryland patent. The Carolina charter provided for a board of eight proprietors, but as they were not incorporated no regulations as to the way in which they should hold their meetings appear. In the grant of Maine to Sir Ferdinando Gorges the way was left open for the proper exercise of royal control by the provision that in matters of government the province should be subject to the regulations issued by the Commissioners of Plantations. By implication in the Carolina charter the right of the colonists to appeal to the English courts was guaranteed in the clause providing that they should not answer in any courts outside the province, except those of England. Each charter also had special provisions concerning religion, and to an extent also concerning trade, but these are not directly in the line of the present discussion. The charter of New York was brief, but it contained the salient features of the palatinate. It made express provision for appeals, but included no reference to a legislature. The bishop of Durham is not mentioned in any of the patents which were issued subsequent to the Restoration.

The charter of Pennsylvania was granted late, after some of the defects in the proprietary system had begun to appear. These arose from the difficulty of enforcing royal control, so as to secure the trade interests of the mother country and the defence of the empire. Hence the points in which Pennsylvania's charter differs from the earlier patents have reference mainly to relations with the home government. The right of the inhabitants of the province to appeal to the king was expressly guaranteed. It was provided that, within five years after their passage, all acts of the general assembly should be submitted to the king in council for his acceptance or rejection, and if they were not rejected within six months after presentation they should stand. The reasons, so far as mentioned, which should justify rejection were inconsistency with the lawful and sovereign prerogatives of the king and with the faith and allegiance due to the government of the realm. The proprietor was also required to keep an agent resident in or near London, so that he might appear at courts to answer any complaints against the proprietor and pay damages. If for one year there should be no such agent, or if for a year he should neglect to answer for penalties, it was declared lawful for the crown to resume the government of the province and

keep it till payment should be made. The king also agreed to levy no tax on the province without the consent of the proprietor or chief governor, the consent of the assembly, or by act of Parliament. Thus the possibility that Parliament might tax the colony was clearly recognized. This group of provisions gives a completeness to the Pennsylvania grant, so far as relations to the home government are concerned, which appears in no other charter. Such being the case, there was no need of specifically guaranteeing to the colonists the rights of English subjects. Finally, the absence of any clause authorizing the bestowment of titles of nobility is suggestive of the political views of the Quaker proprietor.

From the analysis of the charters which we have now completed, it follows that the proprietary province was a large fief carved out of the royal domain across the sea. The proprietor, whether a single person or a board of grantees, held both territorial and governmental powers. These, like the powers held by the counts palatine, were regal in their nature. This means that the institution was essentially monarchical in character; that the province was a miniature kingdom of a semi-feudal type, and the proprietor a petty king. Authority proceeded from above downward, rather than from below upward. To be sure the powers which the proprietor exercised were not sovereign, but, as Coke said, they were king-like, and were used in the same way as if they had been sovereign. In every proprietary province, as in the county palatine, we find, on a small scale and with modifications, a reproduction of the governmental forms and usages of the kingdom of England. The proprietor was the grantee of power, and all was derived through him. However intimate might be his relation to the province, he could never lose his identity and become merged in it, as was the case with the corporation when it was removed into the colony. He always remained distinct from the province in the same sense as that in which the king is distinct from the kingdom. He held strictly by hereditary right, and the powers to which he was entitled were not derived from the province or its inhabitants. The latter were not the grantees, as might be the case with the corporation, and therefore could neither hold nor exercise political rights except as the result of concessions made by or through the proprietor. The proprietor, and not a general court or general assembly, was the origin and centre of the provincial organism.

The province then was not democratic, and if it remained true to its essential nature it could not become so. But its nature could be obscured and changed; as an institution it could be democratized by the development within it of elements of a popular character and by their encroachment upon the powers of the proprietor.

The legislature might gradually limit or draw to itself the powers of the executive, and thus come to exercise a controlling influence. English institutions in their growth since the Norman period have passed through a development of that nature; and in the American provinces an analogous process may be seen at work, though in them the time required for its unfolding was much shorter than in the parent kingdom. The history of the American provinces is emphatically the history of the adaptation of English institutions to the conditions of life on a newly settled continent. There the tendencies favorable to the democratic element in the constitution of the provinces were stronger than they were in England prior to the close of the eighteenth century, while the obstacles to its development were less powerful than in the mother country. Through migration to the New World, the bonds of custom were relaxed and freer scope was given to innovation. Those who became colonists came largely from the classes which were least wedded to the aristocratic and monarchical institutions of the Old World. The political and social privileges which were attached to landholding in England could never be reproduced in a new country and under an exclusively socage tenure. There was necessarily far less social inequality in the colonies than in old countries, and the proprietor could scarcely hope that an aristocracy would develop and become a support for his power. So sparsely were the colonies settled that large estates, even where they existed, had relatively few tenants, and hence yielded only a small income. The proprietor, with his hundreds of thousands of acres, might be and often was land-poor. He moreover possessed none of the dignity which belongs to the office and title of king. He himself was a subject, and, whether peer or commoner, inviolability attached to his person in no higher degree than it did to any of his class among the population of England. The church could awaken for him only the respect which attaches to magistracy. The proprietor also, in any struggle upon which he was forced to enter for the maintenance of his claims, could command only the resources of a single family or group of families. Sometimes these resources were pitifully small, and were even the subject of litigation in the bankruptcy court. In any event they were likely to be too limited to admit of great displays of political energy, to say nothing of military power. These are all causes and tendencies which facilitated the democratizing of the American province, which made the process shorter and more certain of ultimate success than in the European kingdom. But it took the entire colonial period of our history and a revolution at its close to complete this course of development, and thus to transform the province

into the democratic commonwealth. A transformation which in the case of the corporate colony was virtually effected by a single act required for its completion in the province a century and a half. This of itself is adequate proof of the radical difference between the two forms of colonial government which we are studying. The province could not be democratized till the proprietor was gotten rid of, and that object was not attained till independence of England was declared.

If the view here presented be true, the internal history of each of the provinces, royal as well as proprietary, will reveal a prolonged struggle for the ascendancy between the monarchical and the democratic elements in the system, elements represented by the proprietor and his governor on the one hand and usually by the lower house of the general assembly on the other. This struggle, while assuming in each colony certain distinct and peculiar phases, at the same time exhibits characteristics which are common to them all. The province was not structurally harmonious and self-consistent, as was the corporate colony. The discordant elements within it were therefore continually struggling for ascendancy. It is through a broad and thorough study of this conflict that we shall discover the main trend of events within the provinces themselves, and at the same time note the preparation of the forces which were largely to occasion the revolt of 1776. Adopting this as the correct point of view, it will now be my purpose to show what the proprietary province was at the beginning and how it was started on the course of its development. To the proprietor trade was a minor object, and in this connection can be safely disregarded. The powers and rights the exercise of which were deemed important, and which give character to the system, were of two sorts, territorial and governmental. Under these two heads the subject will be treated, and throughout the remainder of this article the reader's attention is invited to a brief consideration of the proprietary land system.

That in the study of the American province the land system holds a position relatively as important as that which properly belongs to it in the treatment of the medieval kingdom or fief, no one would claim. In the typical medieval fief landholding determined the form and character of the military system, and out of or in connection with it developed the aristocratic institutions in both church and state which are so peculiar to the Middle Age. The forms then assumed by society and government in all phases of their development were influenced, if not determined, by the system of landholding. It would have been legally possible, when the earliest American provinces were established, to have attached to the grants all the

conditions of the military tenure; but such a course would have been inexpedient and, if persisted in, disastrous. Prolonged internal peace, with commercial and industrial development, had made that tenure obsolete in England. Before the later provinces were founded it was abolished by law. Both the existing situation and the necessary conditions of future prosperity in the colonies were recognized, when the manor of East Greenwich and the castle of Windsor were selected as the types which should be reproduced in the territorial system of the new continent. As this was done in both the corporate and the provincial grants, the universality of the socage tenure in English America was insured. The obligations of this were fealty and rent,[1] and its liability that of escheat. It was a non-military tenure, free from the oppressive feudal obligations, and adapted to a peaceful agricultural community. When the introduction of the socage tenure was followed by the immediate abandonment in many of the colonies, and the ultimate abandonment by all, of primogeniture as the rule governing the descent of land, the foundation upon which a territorial nobility could develop or rest was removed. Therefore the fief with which we have to do in American history is imperfect, so to speak, diluted, has lost its most salient and important features.

And yet the American province was a fief[2] and the socage tenure feudal in its chief characteristics, and if this fact be neglected, not only shall we lose the correct point of view, but it will be impossible properly to understand many of the facts of our early institutional history. In order not only to theoretical completeness, but also to the attainment of satisfactory practical results, the territorial and governmental history of the provinces must be studied side by side and the interaction of the two noted. Reference can here be made to only a few prominent facts which such a treatment of the proprietary province will reveal.

By the proprietary grant an estate of inheritance, descending to heirs, was created; the land granted through a charter of incorporation passed to successors. In the latter case inheritance in the proper sense of the word was impossible, and therefore the territorial unity of the colony was insured against peril from that quarter. As long as the corporation continued the colony could not be divided or the continuity of its existence broken by a sudden change of owner or rulers. From the outset then in the corporate colony there

[1] Blackstone, *Commentaries*, Bk. II., c. 6. Digby, *Law of Real Property*, p. 49. Fowler, *History of Real Property in New York*, p. 38.

[2] On the feudal nature of this form of grant, see case of Ingersoll *vs.* Sergeant, Wharton's *Pennsylvania Reports*, I., pp. 346 *et seq.* Sharswood, *Lectures Introductory to the Study of the Law*, Lect. VIII. Mayer, *Ground-rents in Maryland.*

is a suggestion of the territorial as well as of the political unity of the modern state. This also applies to the colonies which were founded by the corporations resident in England. But the proprietary province was subject to the conditions of natural inheritance, testate and intestate, and to all the possibilities of change and multiplication of owners involved therein. Moreover the possessions of proprietors were more likely to be sold or leased than were those held by corporations. In other words the proprietary province was treated as an estate of land. It was a vast tenement which the grantee did or might sell, mortgage, lease, devise, or convey in trust, as he would a farm or a homestead. In 1635 John Mason devised by will all his estates and rights in New Hampshire, with certain exceptions, to his grandson, John Tufton, and his lawful heirs, or, in defect of these, to Robert Tufton, another grandson, and his lawful heirs, or, in defect of these, to his cousin, Dr. Robert Mason, and his heirs male. Other conditions were also attached, as that the widow of John Mason should enjoy the revenue of the estates during her life, or until the devisee came of age.[1] By this will New Hampshire became an entailed estate, and in course of time the legal complications usually attendant on that form of settlement arose, and added to the confusion caused by the boundary disputes and by the doubts concerning the origin of John Mason's title.[2]

The Duke of York in 1664 sold New Jersey to Lord Berkeley and Sir George Carteret, and the sale was effected by deeds of lease and release.[3] By that act the province which the duke had just received from the crown was divided, and his territorial rights over a part of it went to the purchasers. But this was only the beginning of the process of subdividing the territory thus granted between the Hudson and the Delaware. About ten years later Berkeley sold his undivided half of New Jersey to John Fenwick in trust for Edward Byllinge, and by later conveyances on the part of Byllinge, three others, including William Penn, were added to the number of trustees. In 1676 Carteret agreed with Byllinge and the three trustees to a division of the province, and under the terms of the Quintipartite Deed what had been Berkeley's undivided half became West Jersey, though now with three active proprietors of its own.[4] Later, to encourage settlement, the proprietors divided West Jersey into ten parts. One of these went to Eldridge and Warner, who had been

[1] Tuttle, *Captain John Mason* (Publications of the Prince Society), p. 404.

[2] *New Hampshire Prov. Papers*, Vols. I. and II. Belknap's *History of New Hampshire*, I.

[3] Leaming and Spicer, *Grants and Concessions*, p. 8. *New Jersey Archives*, I. 8, 10.

[4] Leaming and Spicer, pp. 64, 65. *Archives*, I. 232, 326. Smith, *History of New Jersey*, 83, 89, *et seq.* Byllinge had an equitable interest in the province.

grantees of Fenwick. The nine parts which remained in the possession of the trustees, each of which was called a propriety, were opened for settlement. One of these tenths was taken up by a company of Quakers from Yorkshire, another by a similar body from London. Some of Byllinge's creditors also took shares, but these were bought out by Daniel Coxe, who soon became the largest proprietor in West Jersey.[1] As all grantees retained a joint interest in the enterprise, the number of proprietors became so large that they could not easily meet for the transaction of business, and in 1687 a council of eleven annually elected members was created for this purpose. From that time the territorial affairs of West Jersey were managed by a Council of Proprietors.

Meantime a similar process of subdivision had been going on in East Jersey. By the will of Sir George Carteret all his property in that province was devised to six trustees to be held by them for the benefit of his creditors.[2] After repeated attempts at private sale the proprietorship was put up at auction and bidden off by William Penn and eleven associates for £3400. Their deeds of lease and release were dated February 1 and 2, 1682. Subsequently each of the twelve sold one-half of his undivided share to a new associate, making in all a board of twenty-four proprietors for East Jersey. In 1684 those of the number who were resident in the province were empowered to act on behalf of all the proprietors and with the governor in granting lands and settling disputes with planters. These soon became known as the Board of Proprietors of East Jersey, and continued to have the chief management of the territorial affairs of the province.

In 1708 William Penn mortgaged Pennsylvania to Henry Gouldey, Joshua Gee and several others in England for £6600. When in 1718 Penn died the mortgage had not been entirely paid off. In his will he devised the government of the province and territories to the Earls of Oxford, Mortimer and Poulett and their heirs in trust, to dispose thereof to the queen or any other person, as advantage should dictate. To his widow and eleven others, part resident in England and part in America, he devised all his lands, rents and other profits in Pennsylvania, the territories, or elsewhere on the continent, in trust to sell or otherwise dispose of enough to pay his debts. Of that which remained, all, except 20,000 acres, should be bestowed by the trustees on the three sons of the founder by his second wife, John, Thomas and Richard Penn.

[1] Smith, pp. 80, 130, 191, 199. Woodward and Hageman, *History of Burlington and Mercer Counties*, pp. 7–12, 110.

[2] Whitehead, *East Jersey under the Proprietors*, p. 101 *et seq.*

All the personal estate and arrears of rent he gave to his wife for the equal benefit of her children, and he made her sole executrix. As, after his father's death, William Penn, Jr., the heir-at-law, claimed the government of the province, some delay arose, resulting in a suit in chancery. It was, however, finally decided that the sons by the second marriage should inherit both the territorial and the governmental rights as designated in the will.[1]

By transfers and the process of natural inheritance, the personnel of the board of Carolina proprietors had been totally changed, and in the case of some seats repeatedly so, when, in 1729, the act of Parliament was passed establishing an agreement with seven of their number for the surrender of their title and interest in the province to the crown.[2] The share of the Duke of Albemarle and that of the Earl of Shaftesbury were in the hands of trustees, while there were three claimants of the estate of Lord Berkeley. Here, as in the case of other provinces with multiple proprietors, the colony might, upon agreement, have been divided. The undivided shares might at any time have become divided shares. That the single proprietor could do the same has been shown by reference to the origin of New Jersey. That this did not occur in the history of Maryland is due to good fortune and good management. In the American proprietary provinces there was the same possibility of the indefinite subdivision of territory which in the Middle Age we find working itself out in the states of continental Europe. It follows, then, that the territorial integrity of the proprietary province was not effectively guaranteed. Reference has already been made to the distinction between it and the corporate colony in this respect. Of the royal province at any time there could never be more than one proprietor, the occupant of the throne. It was subject only to the vicissitudes accompanying the inheritance of that dignity. But in the history of the proprietary provinces we observe all the changes of ownership and modes of transfer which appear in the case of private estates of land.

That on its territorial side the province was such an estate may be shown even more clearly by a further consideration. Unlike the grantees of the corporate colonies, to an extent also unlike those colonial corporations that were resident in England, the proprietor was especially desirous so to manage or dispose of his land as to secure from it a revenue. This was perhaps the main object which he had in view when he undertook the work of colonization. It seemed far more important to him than did trade, while, with the

[1] Proud, *History of Pennsylvania*, II. 115–124.

[2] *N. C. Col. Rec.*, III. 34 *et seq.*

exception of Penn, none of the proprietors were in any sense idealists. Therefore he carefully granted the land of the province subject to a rent, and provided for its regular collection. The grant of land by the proprietor took in each case the feudal form; it was not an allod, but a tenement, as were all estates in England. In the province, then, as in England, the relation of lord to tenant existed, and tenure became an element of importance in the social system. That relation was the essence of the proprietorship. This is true in spite of the fact that the military tenure did not exist in the American colonies. The fact that the obligations of socage were fealty and a fixed rent necessitated, when these were enforced, the development of a permanent system of tenant right. Its absence in the corporate colonies is due to the failure of the general court to enforce the payment of the fixed rent, or to introduce clauses requiring this into its land patents. But the proprietors carefully reserved their right in this matter, and continued, as they had opportunity, to enforce it. They acted thus as territorial lords, and collected in the form of quit-rents and fines on alienation a territorial revenue analogous to that which, in the Middle Age, the king and nobles received from their domains. In order to do this they, unlike the general court of the corporate colony, had to institute a system of territorial administration, a provincial land system. Its nature in general may now be briefly indicated.

In all the proprietary charters, save that of New York, the operation of the statute *quia emptores* was suspended, so far as relations between the proprietor and his immediate grantees were concerned. By virtue of this provision each proprietor (or board of proprietors) as mesne lord became the centre from which originated an indefinite number of grants held directly of him, and through him of the crown. The same was true also in New York, although no reference was made to the statute *quai emptores* in its charter.[1]

In the provinces of this class it was left to the proprietor to make grants on such conditions as he chose—limited by the nature of his own patent—to erect or permit the erection of manors, to devise the machinery necessary for surveying, issuing and recording grants and collecting rents. In Maryland and the Carolinas subinfeudation, or

[1] In the Duke's Laws it was provided that former grants should be brought in and new patents taken out "in the behalfe of his Royall Highness the Duke of Yorke." Upon the patenting of land a fee should be paid "in acknowledgment of the propriety of such lands belonging to his Royal Highness James Duke of Yorke." *Charter and Laws of Penn.*, p. 35. In a report prepared in 1670 it is stated that "The Tenure of Lands is derived from his R. H^{s}, who gives and grants lands to Planters as their freehold forever, they paying the customary Rates and Duties . . . . ." Gov. Dongan in 1683 was instructed to grant lands under the province seal, reserving a certain yearly rent and service to the duke and his heirs. *N. Y. Col. Docs.*, III. 188, 333.

the creation of mesne tenants within the province, was both possible and legal. Lord Baltimore granted the manor of Kent Fort to Giles Brent and his heirs and empowered them to convey any part of it, except 300 acres reserved as demesne, "either in fee simple or fee tail, for life, lives or years, to be held of him the said Giles Brent and his heirs, as of the manor of Kent Fort, by and under such rents and services as he or they shall think fit."[1] But in the opinion of Kilty subinfeudation in Maryland was not carried so far as greatly to prejudice the proprietor's interests, for all fines on alienation and escheats went to him, though in some cases forfeitures for non-payment of rent or other causes were claimed by the mesne lords. In the Pennsylvania charter a clause was introduced prohibiting subinfeudation within the province. It provided that those who should hold manors might grant parts of these, but "so as no further tenures shall be created," and that the lands so granted should be held of the same lord of whom the alienor held and by the rents and services customary upon the estate.

Preparatory to the exercise of the power thus bestowed in the charters, the proprietors issued so-called "concessions," or "conditions of plantation," stating the terms on which they would grant lands to colonists. As settlement progressed these were modified, either by new concessions or by instructions to the governors. These were not infrequently accompanied by statements of the physical advantages of the country and relations of recent voyages thither, all intended as a form of advertisement for settlers. Lord Baltimore issued conditions of plantation in 1633, 1636, 1641, 1648.[2] As the territories of the Duke of York were to a considerable extent settled when he received them, it was not necessary to advertise for settlers in this way. But in the Duke's Laws provision was made that patents should be renewed and lands held of the proprietor. From the first also grants were made, when applied for, to those who were already colonists or intended to become such. The Carolina proprietors issued concessions in 1633 and 1665.[3] In 1663 they also sent instructions to Gov. Berkeley of Virginia respecting the granting of land on the Chowan river, which were equivalent to concessions; and in 1667 instructions of a similar character were sent to Gov. Stephens of Albemarle.[4] The Fundamental Constitutions, which were issued as an ordinance by the proprietors in 1669, with the intent that they should be accepted by the colonists, and which were afterwards in part enforced through instructions, contained in per-

[1] Kilty, *Landholder's Assistant*, pp. 107, 28.
[2] *Md. Archives*, Council, I. 47, 99, 223.
[3] *N. C. Col. Recs.*, I. 43, 86.
[4] Ibid., 51, 169.

fected form the idea of the proprietors concerning what should be the territorial system of their province.[1] The Concessions and Agreements issued by Berkeley and Carteret for New Jersey in 1665 were a verbatim reproduction in all their parts of the Concessions issued the same year by the Carolina proprietors for their intended settlers at Cape Fear.[2] In April, 1681, William Penn issued his Proposals to Adventurers, and the following July his Conditions and Concessions.[3]

In character and object these documents were very similar. The grants of land offered in them were in general proportionate to the amount invested in the enterprise by the would-be grantee. Discriminations were also made in favor of first purchasers or settlers, and against those who came to the colony after the sufferings and perils of the first year or two had passed. In all cases a quit-rent was imposed, and as this was a rent service it could be collected by distress without definite specification of the right in the deed.[4] Usually also it was required that the grant should be improved and settled within a specified time. In the later Maryland concessions and in those of Carolina and New Jersey the settlers were required to come armed. Apparently in all cases they were required to pay the cost of passage, and in the Carolina and New Jersey concessions of 1665 the condition was attached that each settler should on arrival have, or be supplied with, provisions for six months. So far as appears, no definite limit was placed on the amount of land which might be granted to an individual. The proprietors reserved for themselves territory in various parts of their provinces proportionate in extent to that which they sold or leased. In Maryland these tracts were called "reserves;" in Pennsylvania, "proprietary tenths;" in Carolina, under the Concessions of 1665, "proprietary elevenths," while under the Fundamental Constitutions they were to include one-fifth of the land of the province and to be called the seigniories. Under the Concessions of 1665 the New Jersey proproprietors were to reserve a "seventh." The land thus reserved, so far as it was not leased, constituted the proprietary domain,[5] while the part of the province which was not granted or improved might properly be called the waste connected with these vast feudal

[1] *N. C. Col. Recs.*, 187 *et seq.*

[2] *N. J. Archives*, I. 28. Berkeley and Carteret were members of the board of Carolina proprietors. In both the Carolina and the New Jersey editions of these concessions, as well as in the Declarations and Proposals issued by the Carolina proprietors in 1663, and the Concessions issued by the West Jersey proprietors in 1677, a form of government was prescribed and the terms on which land would be granted were specified.

[3] Hazard, *Annals of Penn.*, 516 *et seq.*

[4] Coke on Littleton, C. 12. Mayer, *Ground-rents in Maryland*, p. 15.

[5] Mayer, p. 28.

estates. Finally, in all cases the plan of settlement included a provision for at least one town, lots in which should be granted to those who received estates in the country. Penn issued more elaborate instructions on this point than did any other proprietor.

In the space now at command it would be impossible even to attempt a description of the actual process of settlement in a proprietary province, to show how grants of land were made; usually in rectangular form, along the bank of river or bay, and extending back therefrom in successive tiers. By the use of the land papers of the provinces it would be possible approximately to trace this process, and with it the location of the manors and of the proprietary reserves. The extension of settlement and cultivation, with the relative size of estates, could thus be shown, and data obtained upon which could be based an intelligent discussion of the entire social structure of the province. But of special importance here is the fact that the granting of land and regulating of settlement was wholly a function of the province and not of the town or other locality. It was a characteristic and essential part of the proprietary administration. From it originated a territorial revenue consisting of the quit-rents and, in Maryland at least, of fines on alienation. This belonged to the proprietor as territorial lord. For the granting of land and the collection of this revenue administrative machinery was necessary, such as does not appear in the corporate colony. This, when it took final shape, was known as the land-office. At first in Maryland the governor and secretary had immediate charge of the granting of lands. Under warrants issued from the secretary's office land was surveyed by the surveyor-general and his deputies. Upon certificates of survey returned by them patents were issued under the great seal, signed by the governor and endorsed by the secretary[1] and surveyor-general. At the beginning the governor, alone or in conjunction with the secretary, was the receiver of rents. In 1671 a land-office was established and a functionary known as the register placed at the head. In 1684 a land-council of four — all of them members of the provincial council — was created. To this body was entrusted full control of the surveying and granting of land, and one of its members was made receiver and collector of rents, port-duties and other proprietary dues. Later, in the eighteenth century, elaborate machinery for the collection of rents was devised. In Pennsylvania and Carolina there was a development similar to this, though less systematic. Apparently, also, though owing to the fact that outside of New England almost no town records have been printed one must speak with great caution, the towns in the prov-

[1] Kilty, *Land-holder's Assistant*, 64, 108, 112, 256.

inces were only in exceptional cases village communities. If, as in New England, the grant of town land was made to the settlers of the locality in common, they soon divided it; in the great majority of cases however grants seem to have been made wholly to individuals from the outset. So far as this was true the character of the town in the provinces was different from that in New England.

But, further, the territorial system of the province had indirectly an influence on its political development. The policy of the proprietor toward the province was determined to a large extent by the fact that it was originally his estate, and that from it he expected a territorial revenue. The attitude of the governor and of other officials toward it was modified by the same consideration. On the other hand the colonists, and the assembly which represented them, felt the effect of the same condition. They were the tenants of the proprietor and owed him rents and other dues. Their relations to him were not simply political; they were influenced also by tenure. A part of the proprietary revenue was derived from them by virtue of the conditions of their settlement; the legislature could neither grant nor withhold it. But obstacles of various kinds could be thrown in the way of the collection of quit-rents; the legislature could seek to control the territorial administration by passing laws in confirmation of grants, determining how and when rents should be paid, reorganizing the land-office, taxing proprietary estates. Attempts such as these were made, especially in Pennsylvania, and, when persisted in, resulted in important limitations of the territorial powers of the proprietor. Territorial questions, then, frequently came to have a political bearing, and entered deeply into the struggle between the proprietor and the assembly for the control of affairs within the province. To trace the history of these conflicts at this time would be impossible. But they play a part in the history of all the American provinces which entitles them to the consideration of the investigator. An organic relation has always been held to exist between the land system and the development of government by estates, as it existed in medieval Europe. The military system, the organization of society into classes, and through these classes the character of the financial, judicial and ecclesiastical administration were in the feudal estate largely determined by land and land-tenure. With the disappearance of the military tenure the connection between territorial and political development became less intimate. The absence of a nobility, the general abandonment of the principle of primogeniture as a rule of intestate inheritance, and the operation of various causes practically limiting the size of estates, have strengthened this tendency. But so long as the province, in America and

elsewhere, remained a province, an important connection between the land system and political development continued, and unless the fact is properly recognized the history of that form of colonial government will not be understood or correctly treated.

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